Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

MARILYN WILLIAMS,

Petitioner,

v.

UNITED STATES POSTMASTER GENERAL,
William J. Henderson,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Rehabilitation Act, to realize the greater duties imposed on federal employers to provide reasonable accommodation, must a federal employee, to prove she is "otherwise qualified" bear the burden of proof on summary judgment of the actual existence of her reasonable accommodation as opposed to its plausibility?

2. Is a decision maker's knowledge only proven by direct evidence of the "awareness" element of a retaliation claim or is circumstantial evidence sufficient to defeat summary judgment in favor of the employer?

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Other Authorities:

Lex K. Larson, Employment Discrimination § T106.44(a) (2d ed. 1997) 21

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STATEMENT OF JURISDICTION

The court of appeals decided Petitioner's case on May 10, 1999, App. A, and denied Petitioner's petition for rehearing and rehearing en banc on September 17, 1999. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 794(a) of the amended Rehabilitation Act expects the federal government and its agencies to become a model employer of individuals with handicaps.

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1994).

Section 791(b), which applies only to federal agencies, including the USPS, requires, in addition to section 504's prohibition of disability discrimination, that agencies "submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such . . . agency." 29 U.S.C. § 791(b) (1994).

Section 2000e-3(a), codifying section 704 of the 1964 Civil Rights Act, makes it an unlawful employment practice for an employer to discriminate against an employee:

> because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

A. Proceedings Below

Pertinent here, Petitioner, Marilyn Williams filed a disability discrimination and retaliation action against the United States Postal Service ("USPS") under the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et. seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et. seq.* The District Court granted the USPS motion for summary judgment with opinion. On appeal, Ms. Williams' challenged the district court's "otherwise qualified" analysis under the Rehabilitation Act, this federal employer's duty under the Act and the respective Collective Bargaining Agreement ("CBA") to provide reassignment within her medical limitations as "reasonable accommodation", and her disability retirement application upon threat of termination. Ms. Williams further asserted the USPS retaliated against her because of her discrimination complaints. On September 8, 1999, the U.S. Court of Appeals for the Eleventh Circuit affirmed per curiam in a four-page Opinion. On November 4, 1999, the Eleventh Circuit denied Ms. Williams' petition for rehearing and rehearing en banc.

B. Evidence Triggering the Combined "Otherwise Qualified" — "Reasonable Accommodation" Analysis

Petitioner is a senior employee, having worked twenty-one years for the USPS in Miami, Florida, starting as a letter carrier in 1973. R1-43-7, RS1-3-2-1, RS1-3-8-3. She suffered and was first hospitalized for a nervous breakdown in 1973. R1-43-81-82; RS1-8-3. The USPS gave her a six-month leave. R1-43-81-82; RS1-8-3. Petitioner trained and worked successfully for

roughly fourteen years. R1-43-9-10. She was ultimately promoted to window clerk. R1-43-7.

Around 1987, she bid into her PS-5 utility window clerk position at Norland Surfside Station ("Surfside"), and became responsible for distributing morning mail, distributing mail to carriers, working in "the box" section, sending postal meters and, ninety percent of her time, at the window, where she worked until her forced disability retirement in 1995. R1-43-11-12, Exh. 1, RS1-3-2-3. She had numerous excellent work evaluations and customer commendations. RS1-3-8-12.

During that time, Petitioner lost three of her four sons. The oldest, Victor, was robbed at gunpoint and killed in 1989. RS1-3-8-5. The youngest, Vincent, was killed in 1990 by a drunk driver. RS1-3-8-6. Her third son, Anthony, was diagnosed with AIDS in 1989 and died on February 10, 1995. R1-43-21; RS1-3-8-6. She continued receiving treatment for chronic depression and high-blood pressure. RS1-8-4, 5, 6.

Seeing her son had little time to live, R1-43-20-21, RS1-8-9, Petitioner took her earlier-requested, FMLA leave on January 31, 1995, without USPS approval and without pay — the same day Surfside pulled her "badge" after she called Surfside to give notice she would be arriving late because her son's nurse was arriving late. R1-43-20-21, 24, 28-29, RS1-8-9, 10. Mr. Rodon, Petitioner's Surfside Station manager then, admitted her badge was pulled. RS1-3-4-22-26. Petitioner's son died February 10, 1995. R1-43-21-22, 27-28.

After Petitioner's January 31st leave began, Ms. Kelly Hearn started March 11, 1995. R1-45-7-9, 22-23. Mr. Rodon trained Ms. Hearn as his replacement. RS1-3-4-9-10, Initial Brief at 7-9. Ms. Hearn was the decision maker involved in Petitioner's termination or retirement. RS1-3-5-2, 5.

Mr. Rodon testified "we were aware of [Petitioner's] situation." RS1-3-4-17, 22. Ms. Hearn testified she did not know Petitioner's "son was ill"; but knew Petitioner requested leave for her sick son. R1-45-39, 40. Mr. Rodon testified he told Ms. Hearn that Petitioner had requested leave, but had not returned

the FMLA "documents". RS1-3-4-55-57. Ms. Hearn backdated and signed Petitioner's unsigned FMLA requests, "the 3971's", in Petitioner's personnel file, on March 11, 1995, R1-45-28-29, to reflect an FMLA leave start date of January 1, 1995, rather than January 31, 1995, rendering March 26, 1995 the Leave-expiration date. R1-45-29-32, 33, 35, 39.

Mr. Rodon testified the USPS actual policy on FMLA exhaustion was:

> [i]f you have exhausted all of your leave, then you could still request Family Medical Leave Act and take leave without pay. You are not going to get paid while you're out, but *the leave is protected.* RS1-3-4-19-20 (emphasis added).

After reviewing Petitioner's entire file, Ms. Hearn called Petitioner, roughly one week later to find out if she was planning "to return to work after March 26". R1-45-41, 44. Petitioner said Ms. Hearn told her to return to work, as she had grieved "long enough", or be fired. R1-43-25-29, 32-33.

On May 2, 1995, Ms. Hearn sent Petitioner a "notice to report". R1-43-29-31, 33-Exh. 3, R1-45-42-43:

> 1. Provide me with *medical certification to substantiate your absence.* Due to the nature of your absence, the medical certification presented *must indicate that you are able to return to full duty* without hazard to yourself or others.
>
> *OR*
>
> 2. *Provide justification to me for your continued absence*, which must include *current medical certification* to substantiate your absence to the present time, and should *include a prognosis* indicating when you will be able to return to duty.
>
> Any portion of your absence not properly substantiated *may be charged to AWOL*, which will result in appropriate *disciplinary action up to an*

> *including removal.* R1-43-Exh. 3 (emphasis added), R1-45-47-48.

Four days later, Petitioner presented medical certification from Dr. Egbeazien Oshodi, her treating psychologist, and possibly a letter from her deceased son's doctor. R1-43-34, Exh. 5. Dr. Oshodi's May 9th letter stated:

> . . . Ms. Marilyn Williams . . . began out-patient treatment with me on December 31, 1994 at 7:00 p.m.
>
> Her initial treatment issues revolved around work-related stress. . . . However, with the recent death of another adult son, she again fell into a deep-seated depression. For now, she has started to make slow progress . . .
>
> With her presently under therapeutic care from me, Ms. Williams could be able to gain more coping skills, and subsequently return to work about the first week of June, 1995. It is my clinical recommendation that any postal task she is assigned to (at least for now) be low or moderate in stress, compared with her last postal assignment which brought her into stress-related therapy. R1-43-Exh. 5.

Petitioner was taking Zoloft, Delacort and Lozol for depression and high blood pressure, causing side effects. R1-43-35-37. She had taken Zoloft before her son's death, while working at the USPS, without side effects, but not Delacort and Lozol. R1-43-37.

Ms. Hearn responded on June 5, 1995 with another "notice to report for duty", attaching full-duty job descriptions as potential accommodations — including Petitioner's original position at Surfside and three full-duty positions at other facilities. R1-43-38-40, Exh. 6; RS1-3-8-10. The USPS never advanced that these proposed, full-duty positions were within Petitioner's medical limitations. R1-45-67.

In consultation with Dr. Oshodi, Petitioner asked for "light-duty" three days later, in a June 9, 1995 letter, to work as distribution clerk in the back room while she adjusted to her medication vision and coordination side effects and recovered from her deep depression. R1-43-48-Exh. 8, R1-43-49-55; RS1-3-8-10. Petitioner could not perform the proposed, full-duty positions at that time because of their high visual and coordination requirements and requisite additional computer training, R1-43-40-41, or additional training in "schemes", learning zip codes to distribute the mail and testing. R1-43-38-45, 48, Exh. 6, RS1-3-8-10.

Article 13, Section 2, of the USPS-American Postal Workers Union, governed USPS light-duty and limited-duty programs and imposed a USPS duty to seek reassignment of employees on a temporary or permanent basis:

> **A. Temporary Reassignment**
>
> Any full-time regular . . . employee *recuperating from a serious illness or* injury and *temporarily unable to perform the assigned duties* may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment. The request shall be supported by *medical statement from a licensed physician . . . stating, when possible, the anticipated duration* of the convalescence period. Such employee agrees to submit to further examination by a Public health Service doctor or physician designated by the installation head, *if that official so requests*. RS1-3-8-15-16 (emphasis added).

Section 3, "Local Implementation" obligated each local branch to "explore ways and means to make adjustments in normal assignments, to convert them to light-duty assignments without seriously affecting the production of the assignment." RS1-3-8-17. Permanent "light-duty or other assignment" was available to any five-year-or-more employee who provided certification from "the United States Public Health Service or a physician

designated by the installation head". RS1-3-8-16. Ms. Hearn did not understand and did not request further examination of Petitioner's medical limitations set forth by Dr. Oshodi. R1-45-67, 68-70.

Article 13 of the CBA did not distinguish between light- and limited-duty and a former USPS employee, Sharon McNair, testified the actual light-duty application procedure varied with the supervisor. RS1-3-8-32. The USPS's Stephen Murray testified "light-duty" positions, like those Petitioner requested were unfunded by workers' compensation and "not guaranteed". R1-40-31-32. He also testified that light-duty requests had specific procedural requirements. R1-40-31-32.

The USPS' Ms. Hearn testified Ms. Williams was not offered a light-duty reassignment because no light-duty position was available. R1-43-Exh. 9, R1-45-59. Article 13, Section 4, "General Policy Procedures" of the CBA obligated the USPS to make "every effort" "to reassign the concerned employee within the employee's present craft or occupational group, *even if such assignment reduces the number of hours of work for the supplemental work force*." RS1-3-8-17 (emphasis added). Ms. McNair testified "light duty was routinely granted" because Surfside was regularly overwhelmed with "very high volume". RS1-3-8-32-34. The USPS had created a formal job classification for these positions, "KP-12", to allow for multiple cross-position responsibilities, including "registered mail, sorting of mail, certified mail, paper doll (notifying customers of change of address)." RS1-3-8-33. Light-duty saved the USPS overtime expenses. RS1-3-8-7. Without a light-duty or limited-duty employee to take on these cross-position responsibilities, Ms. McNair testified, many of the full-duty USPS Surfside employees had to work overtime to keep up with the Station's high volume, to "clean up the back[ed]-up magazines that had to be mailed on time." RS1-3-8-32-34.

Petitioner and Ms. McNair, herself granted limited-duty, testified, and Ms. Hearn admitted, that the USPS' Gladys Ortiz[1]

1. Ms. Ortiz was reinstated on a "last chance agreement". R1-45-54.

was granted light/limited-duty. RS1-3-8-6, 11, 33-34; R1-45-53, 56-57. Also according to Ms. Williams and Ms. McNair, Surfside's Michael Borgan was granted light-duty; Surfside's Margarite Harrell was granted light-duty in 1997 for a lung condition; and Surfside's Lourdes Aleman was granted limited-duty for pregnancy. RS1-3-8-6, 11, 33-34.

Three days after Petitioner's June 9th letter, she reported to work, on June 12, 1995. RS1-3-8-34. The district court below found that:

> [Ms.] Hearn asked [Ms.] Williams to provide medical documentation that she could perform her job. [Ms.] Williams testified that Hearn told her there was nothing for her to do. R2-79-3.

Ms. McNair remembered that day because the other Station "clerks and management" joked about Petitioner's situation. RS1-3-8-34.

Twelve days later, on June 24, 1995, Ms. Hearn wrote Petitioner that she would terminate her if she did not (1) prove she was fully recovered, (2) file a claim for limited-duty for an on-the-job injury, or (3) ask for light-duty and choose from the four full-duty positions Ms. Hearn already offered: all outside Petitioner's current medical limitations. R1-43-Exh. 9; R1-45-42.

On July 3, 1995, Dr. Oshodi certified, again, in a letter to Ms. Hearn that Petitioner was still under his care and needed "low or moderate[ly] stressful assignments". R1-43-Exh. 10. Ms. Hearn requested Petitioner's termination, R1-45-48, because she did not "report for work and didn't document properly why she couldn't work." R1-45-49-50.

Under threat of termination, Petitioner applied for and Ms. Hearn opposed her occupational disease or injury status. R1-45-46-47, 60-61. Ms. Hearn also opposed Williams' involuntary, early disability retirement application, filed upon recommendation of termination. RS1-3-8-7-8, 11, 10-11, 27-28, R1-45-60-61.

Relying on that application, the Eleventh Circuit Opinion concluded that Petitioner "failed to show she was able to meet her job requirements despite her handicap" because, "in her disability retirement application, [Ms. Williams] admitted that her handicap and medication 'prevent[ed] [her] from performing [her] duties as a window clerk or any duties at the postal service." App. at 3. Sentences immediately preceding and proceeding Petitioner's disability application explained that the basis for her statement that she could no longer work at the USPS was the USPS' failure to attempt reasonable accommodation.

> [Ms. Williams] return[ed] to work on June 12, 1999[.] [She] was advised by Supervisor Kelly Hearn that *no work was available* for [her] at Surfside. *The EAP doctor sent Ms. Hearn a letter attesting that [Ms. Williams is] presently in therapy.*
>
> Though Ms. Hearn had called [her] home on several occasions to tell [her] to return to work, when [Ms. Williams] made the attempt to try and return back to work, Ms. Hearn inform[ed Ms. Williams] that [Ms. Williams] would have to get a letter from [her] doctor stating that [she] can return to *full* [rather than the requested light] duty. Though Ms. Hearn had received a letter from [Ms. Williams'] doctor stating that perhaps [Ms. Williams] would be able to return to work in a position that was less stressful in nature. *No work had been provided to [Ms. Williams]. Ms. Hearn totally disregarded [her] doctor's recommendation, as a result of Ms. Hearn action*, it complicated [her] depressive state, *I don't feel that I will be able to return to work at the postal service anymore*. . . . I am taking Zoloft which ha[s] many side effects that will prevent me from performing my duties as a window clerk or any duties at the postal service. . . . I can't perform any tasks that require[ ] alertness or concentration, coordination.

> R1-43-Gov. Exh. J at 11 (emphasis added); Rehearing en banc Petition at 10-11.

When asked "[w]hat efforts have been made by your agency to change your work area or your job to make it possible for you to perform useful and efficient service in your position or another position", Petitioner further certified that lack of reasonable accommodation was the basis for her belief she was no longer qualified.

> [Her] supervisor want[ed] to *put [her] in a more stressful environment at another facility* which will *require additional scheme and computer training.* [She] bid away from such jobs because of the stress level, concentration, visual and coordination skills. [She] can't concentrate on any scheme training or computer training. R1-43-Gov. Exh. 11 at 8; Rehearing en banc Petition at 10-11.

C. The Facts Triggering Analysis Of The Knowledge-Causal Connection Under Petitioner's Retaliation Claim.

The USPS was unable to produce Petitioner's employee file to ascertain its full contents on the stated basis that Petitioner's file no longer existed. Ms. Hearn reviewed Petitioner's "entire employee file", but testified she saw no complaints of discrimination. R1-45-61-63, 71, RS1-3-8-8.

Petitioner and Ms. Sharon McNair, who worked at the Surfside Station during the time in question, testified that Petitioner's complaints of discrimination would have been in Petitioner's employee file, and, according to Ms. McNair, Ms. Hearn confirmed this to be so. R2-77-5, R2-80-5, Initial Brief at 8-9, Reply Brief at 4. Ms. McNair also testified that, while a management trainee at Surfside, she learned that USPS Surfside employees' files contained:

> attendance records (vacation, sick leave, tardies used to determine disciplinary action), disciplinary records (such as letters of warning) *allegations of*

discrimination, such as letters and EEO complaints. R2-77-4, R2-80-4 (emphasis added).

The USPS' Mr. Rodon, Petitioner's Surfside station manager in 1994 and early 1995, testified Petitioner's personnel file contained information about Petitioner's depression, letters from her doctor and documents regarding USPS EAP psychological counseling. RS1-8-5; RS1-3-4-29, 37, 58-59. Petitioner filed several EEO discrimination complaints in 1994, including Mr. Rodon, which the USPS acknowledged in its answer and summary judgment moving papers, for Mr. Rodon's refusal to grant Petitioner's requested FMLA Leave to care for her dying son, Anthony. R1-43-17, RS1-3-8-5, RS1-3-8-7-8, R1-43-19-20.

The USPS also admitted Mr. Rojas received a letter from Petitioner's attorney complaining of Mr. Rodon's discrimination, who "may have given the letter to the Union, who may have[, in turn,] provided the letter to [Mr. Rodon] for his review." RS1-3-4-42-50, R2-73-2. Mr. Rodon also knew Petitioner invoked the Union grievance procedure over a disputed suspension letter and Mr. Rojas may have mentioned this attorney-letter to him. RS1-3-4-48. Mr. Rodon also recalled placing in Petitioner's Surfside employee file supervisor notes and a note from Petitioner complaining about his rude manner toward her. RS1-3-4-57.

In Petitioner's June 9th letter to Ms. Hearn requesting accommodation, Petitioner also complained to Ms. Hearn, the decision maker, that she was violating the terms of the CBA and discriminating against Petitioner because of her mental and emotional condition. R1-43-Exh. 8. Ms. Hearn testified she did not "ask[ ] that Ms. Williams be terminated" until after that June 9th letter, and after Ms. Hearn's June 24, 1995 letter. Initial Brief at 49-50, R1-45-48, Rehearing en banc Petition at 7-8.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Because The Decision Below Contravenes The Rehabilitation Act's Purpose By Concluding That Disabled Federal Employees With Seniority Cannot Be Reasonably Accommodated And Are, Therefore, Not "Otherwise Qualified" Notwithstanding Record Evidence Of Reassignments Required By And Reasonably Available Under The Federal Employer's Policies, Customs and CBA.

This case presents a meaningful opportunity for the Court to clarify the applicability of the standards in this Court's recent *Cleveland v. Policy Management Systems Corp.*[2] decision to claims like Ms. Williams' under the Rehabilitation Act. In *Cleveland v. Policy Management Systems Corp.*,[3] the plaintiff, Cleveland, brought an ADA lawsuit one week before her SSDI award, and alleged that Policy Management Systems had "terminated" her employment without reasonably "accommodating her disability", with a supporting affidavit from her treating physician. Like the court of appeals here, App. A at 3, the district court never got to the merits of plaintiff's reasonable accommodation claim, instead finding summary judgment to the defendant proper because Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled, estopping Cleveland, therefore, from proving she could "perform the essential functions" of her job, at least with "reasonable accommodation", citing 42 U.S.C. § 12111(8).

The Fifth Circuit affirmed, and wrote:

> The application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability." *Cleveland*

2. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

3. *Cleveland*, 526 U.S. at 795.

> *v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (1997).

Accordingly, the Fifth Circuit reasoned, because

> Cleveland consistently represented to the SSA that she was totally disabled, she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that for the time in question she was nevertheless a "qualified individual with a disability" for purposes of her ADA claim.[4]

This Court, recognizing inter-Circuit disagreement over the legal effect on an ADA suit of the application for, or receipt of, disability benefits, granted *certiorari* and ultimately reversed the summary judgment in *Cleveland* and remanded for further proceedings, explaining that:

> a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case — at least *if she does not offer a sufficient explanation*. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction. . . . Rather, she must *proffer a sufficient explanation*.[5]

Here, the court of appeals rejected Petitioner's argument that the fact that a former USPS employee receives social security or federal employee retirement system disability benefits would not preclude the employee from both asserting and proving that she was a "qualified handicapped person" for purposes of the Rehabilitation Act[6] at the time she requested

4. *Id.* at 518-19.

5. *Cleveland*, 526 U.S. at 795 (emphasis added).

6. Though Ms. Williams' actual disability and "regarded as" were never questioned by the decisions below, since Petitioner's nervous breakdown and hospitalization in 1973, her disability prevented her from engaging in the kinds of activities in which she, or any average

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accommodation.[7] App. A at 3. And the decisions below rejected entirely Petitioner's explanations of her disability retirement application statements, on her inability to perform any USPS positions to mean USPS positions absent reasonable accommodation or light-duty — explained in her same disability application and, again, in her affidavit in this lawsuit. App. A at 3, App. B. at 4, RS1-3-8-7-8, 23,27. The decisions below, interpreting the Rehabilitation Act, implicitly conflict with the Court's *Cleveland v. Policy Management Systems Corp.* decision interpreting the ADA, and *certiorari* should be granted on that basis.

This case is also a timely opportunity for this Court to finally put to rest the conflicting inter-Circuit interpretations concerning the proper allocation under the Rehabilitation Act of the burdens of persuasion and production to satisfy the "otherwise qualified" and "reasonable accommodation" elements. It is uncertain which side properly bears the burden and, if so, how much.

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person in the general population would normally engage — eating, driving and interacting with people. Initial Brief at 28, RS1-3-8-1-11, RS1-3-6-1-10, RS1-3-7-1-20; EEOC Compliance Manual § 902: Definition of the Term "Disability", EEOC No. 915.002 at 902-32; *see Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198 (E.D. Pa. 1994) (side effects of medication); *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992) (depressive disorder); *Hill v. Florida Dept. Health*, 58 Fair Empl. Prac. Cas. (BNA) 177 (M.D. Fla. 1992) (same); *Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981) (psychiatric problems and inability to handle stress); *Howard S. v. Friendswood Independent School Dist.*, 454 F. Supp. 639 (S.D. Tex. 1978) (serious emotional disturbance).

7. *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997) ("We agree with the majority of our sisters circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA"); *Kupferschmidt v. Runyon*, 827 F. Supp. 570 (E.D. Wis. 1993); *Robinson v. Neodata Servs., Inc.*, 94 F.3d 499 (8th Cir. 1996); *Overton v. Reilly*, 977 F.2d at 1190.

In *School Board v. Arline*,[8] this Court recognized, even before the 1992 Rehabilitation Act amendments, that:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee [and] *they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.* (Citations omitted).[9]

And under the statutory language,[10] federal employers have greater duties to accommodate disabled workers than federal grantees,[11] most notably here, the duty of reassignment

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8. *School Board v. Arline*, 480 U.S. 273, 289 n.19 (1987), *reh'g den'd*, 481 U.S. 1024 (1987) (emphasis added).

9. *Arline*, 480 U.S. at 289 n.19; *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) (comparing federal employers greater duty to accommodate than federal grantee's); *see* Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781, 800-803 (1989).

10. [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1994).

11. Even before the 1992 amendment, the EEOC broadened the duties accorded federal employers:

> It is important to consider both the legislative history and Congressional mandates of the Rehabilitation Act on federal agencies. The legislative history of the Rehabilitation Act shows that *Congress expected and fully intended that the federal government was to be a model employer* of the handicapped, *taking affirmative action to* hire and *promote* the disabled.

Ignacio v. United States Postal Serv., Pet. No. 03840005, Fed. Equal Opportunity Rptr. P 843159, at XII-84-264 (EEOC Sept. 4, 1984).

recognized long before in the Court's *Davis* decision and in EEOC regulations.[12]

If this heightened federal employer duty is to have meaning, it cannot be disregarded on the burden-shifting allocations of a summary judgment motion. While the ultimate burden of proving unlawful discrimination rests with the plaintiff, confusing the burdens is the fact that "reasonable accommodation" is an element that must be addressed by *both* the employee (as part of a showing she is "otherwise qualified") and by the federal employer (who must demonstrate that reasonable accommodation is not possible).[13] Lower courts have

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12. *See Davis*, 442 U.S. at 413-14. Under EEOC regulations, "[r]easonable accommodation may include, but shall not be limited to . . . job restructuring, part-time or modified work schedules . . . and other similar actions." 29 C.F.R. 1613.704(b) (1991). And the Act's regulations were amended in October 1992 to specifically impose obligations on federal employers to *seek out* accommodation for its disabled employees meeting the employees' specific restrictions:

> (g) *Reassignment.* When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, *an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary* unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required. . . .

29 C.F.R. § 1614.203(g) (1996) (emphasis added).

13. *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 136 (2d Cir. 1995) ("Given the rather obscure regulatory language," not surprising that courts "have found the assignment of the burdens of production and persuasion particularly difficult as to reasonable (Cont'd)

allocated these burdens of persuasion and production under the Rehabilitation Act in divergent ways.

At least one of the circuits considering reasonable accommodation has placed, as was done in the decisions here, the burden of *production and persuasion* on the plaintiff. In *Barth v. Gelb*,[14] the D.C. Circuit held a plaintiff must demonstrate both that a given accommodation would allow him to perform the essential elements of the job and the accommodation would be reasonable "in the run of cases." But contrary to the decisions below here,[15] the *Barth* court held that an employer who invokes the undue hardship defense *bears the burden of proof on that issue*, not the employee.[16]

The Fifth Circuit and the Ninth Circuits have historically taken the opposite approach; *the employer* had the initial burden to show the plaintiff cannot reasonably be accommodated.[17] And the Second and Seventh Circuits criticized the D.C. Circuit's position as overlooking those situations in which an accommodation otherwise unreasonable for most employers might be reasonable under particular facts.[18] The D.C. Circuit

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accommodation."); *see generally* 29 C.F.R. § 1614.203(g) (1996) ("An agency shall offer to reassign the individual . . . unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program."); 29 C.F.R. § 1613.702(f) (1991) ("qualified handicapped person" is one who, "with or without reasonable accommodation, can perform the essential functions of the position in question").

14. *Barth v. Gelb*, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993).

15. The district court order below said: "[Ms. Williams] has the burden of showing that a funded, vacant position existed". R2-79-10.

16. *Barth*, 2 F.3d at 1186-87; *see also Carr v. Reno*, 306 U.S. App. D.C. 217, 23 F.3d 525, 529 (D.C. Cir. 1994).

17. *See Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 301-04, 308 (5th Cir. Unit A, Nov. 5, 1981).

18. *Borkowski*, 63 F.3d at 137; *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (Posner, C.J.) (*Barth*'s view
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approach was also criticized as overlooking that "the employer has far greater access to information than the typical plaintiff, both about its own organization, and equally important, about the practices and structure of the industry as a whole."[19]

The Second Circuit also found problems with the Fifth and Ninth Circuit approaches, which placed the burden of demonstrating that the plaintiff is not otherwise qualified for employment on the employer.[20] The Second Circuit has, therefore, urged a "middle course" — put burdens on both parties and comply, thereby, with the intended purposes of the Rehabilitation Act, while adjusting for the reality that the information the employee needs to prove the reasonable accommodation element of her *prima facie* case is most likely in the exclusive possession of the employer, otherwise unassailable if that employer bears no evidentiary burden of proof on the issue whatsoever.[21] Under the more lenient federal-grantee standard, the Eighth Circuit holds that, once an employee makes a facial showing that her handicap can be accommodated, the burden then shifts to the employer to *show, beyond mere conclusions*, that the employee can not be accommodated.[22]

This Court's guidance is important to resolve this turmoil among the Circuits over the proper allocations of burdens of persuasion and production for federal employers bound to

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of undue hardship "permits an employer to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him.", suggesting employer escapes liability even if only reason accommodation "would break him" is its own inefficiency relative to others in industry).

19. *Id.*

20. *Borkowski*, 63 F.3d at 137.

21. *Borkowski*, 63 F.3d at 137-38; *Cehrs v. Northeast Ohio Alzheimer's Res. Cntr.*, 155 F.3d 775, 781 (6th Cir. 1998) (approved Second Circuit's burden-shifting allocation under ADA); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (request for medical leave may constitute reasonable accommodation).

22. *Wood v. Omaha School Dist.*, 985 F.2d 437 (8th Cir. 1993).

comply with their respective heightened duties under the Rehabilitation Act. Employees are properly required to produce information they are in the best position to have: (1) the fact of their disability and (2) their desire to be accommodated.[23] But once an employee does that:

> [a]n employer, to meet its burden under the Act, *may not merely speculate that a suggested accommodation is not feasible.* When accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to "gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job . . . ."[24]

The USPS became obligated to assist Petitioner in identifying an available job *within her restrictions* — not merely Ms. Hearn's one-time, "take-it-or-leave-it" full-duty jobs beyond Petitioner's medical limitations.[25] And the First, Second, Sixth,

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23. *See Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991) (holding that while employer not have initial burden of raising issue of accommodation, once employee has done so, "in light of the goals of the Rehabilitation Act and greater access of the employer to information regarding the feasibility of various possible job modifications, the employer is given the ultimate burden of proof on the issue of reasonable accommodation").

24. *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (emphasis added); *see Woodman v. Runyon*, 132 F.3d 1330 (10th Cir. 1997); *Crawford v. Runyon*, 37 F.3d 1338 (8th Cir. 1994) (former USPS mail handler established *prima facie* case under Rehabilitation Act by showing he suffered from major depression and paranoid schizophrenia and USPS took adverse employment action by removing him).

25. The Interpretive Guidance on Title I, Americans with Disabilities Act, further suggests this burden on the federal employer to go through this interactive process of identifying a reasonable accommodation:

> Once a qualified individual with a disability has

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Seventh, Eighth and Ninth Circuits' burden allocations that — while a federal plaintiff bears the ultimate burden of proving she is "otherwise qualified" under the Rehabilitation Act — a federal employee's burden with respect to the *plausibility* of reasonable accommodation should remain only a burden of production on summary judgment, advances the Rehabilitation Act's mandate that federal employers act affirmatively to provide reasonable accommodation for disabled workers. Once the plaintiff makes that facial showing, the burden should then logically shift to the federal employer *to prove, not merely conclusorily state,* that accommodating a federal employee under her particular circumstances is an undue — far more than *de minimis* — hardship.[26]

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> requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.

29 C.F.R. Pt. 1630, App. § 1630.9 (1996). The Guidance expects an employer and employee together to identify accommodations not immediately obvious. *See id.*

26. *See Gilbert*, 949 F.2d at 642; *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995) (though plaintiff retained ultimate burden of proof on ability to perform essential functions of job, with or without accommodation, "much of the information which determines those essential functions lies uniquely with the employer"); *see also Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) ("We do not suggest that the employee has the burden of identifying an open position before the employer's duty of accommodation is triggered. In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer."); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (The "employee's initial request for an accommodation . . . triggers the employer's obligation to participate in the interactive process."); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir.

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Certiorari review is also crucial for this Court's guidance on the standard against which "otherwise qualified" is to be measured. Is it the disabled employee's currently-held position or the desired position to which the disabled employee seeks reassignment? According to the EEOC implementing regulations, a "qualified individual" is:

> an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of *the position in question* without endangering the health and safety of the individual or others and who . . . meets the experience or education requirements . . . of the position in question.[27]

So whether an individual is "qualified" is really asking two questions: (1) can the individual perform the essential functions of the job at issue and (2) if the individual is not able to perform those essential functions of that job, is there a reasonable accommodation enabling her to do so?[28] Whether a person is "otherwise qualified" under the Act, therefore, turns inextricably on whether she can be reasonably accommodated. And as already set forth, a federal employer "cannot deny an employee

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1996) (employer bears a responsibility in determining necessary accommodation).

What is "reasonable" for a federal employer differs for a private employer. *See, e.g.*, Lex K. Larson, Employment Discrimination § T106.44(a) (2d ed. 1997) (" 'Reasonable accommodation' in federal employment does not raise the same issues."); *see also, e.g., Mantolete*, 767 F.2d at 1425 (Rafeedie, District J., concurring) (demanding burdens placed on federal employers to seek means of accommodation justified in light of the Act and "its implementing regulations. . . . Certainly it is hoped that private employers will follow the government's lead, but it is debatable whether Congress meant to impose equivalent obligations.").

27. 29 C.F.R. § 1614.203(a)(6) (1996) (emphasis added).

28. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993).

alternative employment opportunities reasonably available under the employer's existing policies."[29]

Virtually every Circuit, post-1992 amendment to the Rehabilitation Act, to consider the issue, has correctly held that the ADA, post-*Arline*, requires an employer to consider reassignment to a vacant position if the disabled employee, with seniority, cannot be reasonably accommodated in her current job.[30] Ms. McNair and the CBA showed the USPS provided these light and limited-duty positions to Surfside employees regularly under a formal job classification, "KP-12". RS1-3-8-6-8, RS1-3-8-32-34. Likewise, *the record* overwhelmingly showed an actual policy of accommodating Surfside employees with light and limited-duty, consisting of answering the telephones, sorting mail, and performing many miscellaneous distribution and customer service duties for as much as one year. RS1-3-8-6, 11, 33-34, R1-45-53, 56-57, RS1-3-8-6, 11, 33-34. And Article 13, Section 4, "General Policy Procedures" of the agreement obligated the USPS to make "*every effort*" "to reassign the concerned employee within the employee's present craft or occupational group, *even if such assignment reduces the number of hours of work for the supplemental work force*." RS1-3-8-17. So Ms. Hearn's unilateral offer in her May and June letters to Ms. Williams to either accept her old window clerk job or one of the three full-duty positions, or be terminated,

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29. *Arline*, 480 U.S. at 273, 289 n.19; *see Rhone v. United States Dep't of the Army*, 665 F. Supp. 734, 744 (E.D. Mo. 1987).

30. *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1999 U.S. App. LEXIS 13185, **16-38 (10th Cir. 1999) (en banc); *Feliciano v. Rhode Island*, 160 F.3d 780, 785-86 (1st Cir. 1998); *Aka v. Washington Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1300-01 (D.C. Cir. 1998) (en banc); *Mengine v. Runyon*, 114 F.3d 415, 418 (3d Cir. 1997); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 350 n.4 (4th Cir. 1996); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498-99 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113-15 (8th Cir. 1995).

violated these regulatory and contractual duties owed to Petitioner as a federal employee.

Indeed, these decisions below analyzed the wrong premise — that "position in question" must be positions Petitioner either previously held or the other full-duty positions Ms. Hearn offered her. R2-79-9-11. So restrictively "position in question" disregarded the employer's duty to reassign to light-duty originating in *its own station needs, policies, customs and CBA*.[31] Whether "light-duty" was an available and reasonable accommodation rendering Petitioner "otherwise qualified", against record evidence of *actual policies and need* for light-duty workers at Surfside, R1-43-12-13; RS1-3-8-32-34, RS1-3-8-7, RS1-3-8-33, was a disputed issue of material fact that should not have been weighed on summary judgment.[32]

Second, "position in question" cannot logically refer only to Petitioner's qualifications for the original or other full-duty positions, without rendering § 1614.203(g) of the EEOC regulations absolutely meaningless. Petitioner's discrimination claim turned on the USPS's ultimate failure to grant her light-duty accommodation. Section 1614.203(g) says that a federal agency *must* offer employees reassignment who, because of a handicap, can no longer perform the essential functions of their position *even with reasonable accommodation* — to individuals

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31. *See Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998) (deviation from internal policies creates suspicion of discriminatory intent); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998) (reversing summary judgment on Rehabilitation Act claim for mental and physical disabilities where employee forced to return to full-time teaching position or be terminated); *Taylor v. Garrett*, 820 F. Supp. 933, 936, 938 (E.D. Pa. 1993) (availability of reassignment as possible reasonable accommodation "casts doubt on the limited, retrospective definition of the phrase 'position in question' urged by [the defendant]"); *see also* 29 C.F.R. § 1630.2(n)(1); *Valdez v. Albuquerque Public Schools*, 875 F. Supp. 740 (D. N.M. 1994).

32. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter").

conceding, therefore, that they are *un*qualified for their original positions. The court of appeals conclusion that, since Petitioner was a window clerk and could no longer perform that job's "essential functions" or these other full-duty jobs Ms. Hearn offered, she was not "qualified" for the "position in question" and, therefore, not entitled to accommodation depended entirely on the circular conclusion that a federal employer had no duty to attempt to reassign a federal employee to a light-duty position, ignoring, again, existing policy, customs and the CBA affording light-duty as a viable reassignment option. By commanding a federal employee to demonstrate she can perform her original job or equivalent full-duty jobs, a federal employer brilliantly excludes the very individual that § 1614.203(g) was intended to benefit. "Position in question" cannot remain consistent with the § 1614.203(g) reassignment requirement if "otherwise qualified" is approved as requiring proof that the disabled employee seeking to be accommodated from those duties can still perform those essential duties "with no restrictions", as demanded by the court of appeals. R1-43-Exh. 9, R1-45-42.

On summary judgment, other lower courts find the relevant question for "otherwise qualified" under the Act and the corresponding EEOC regulations to be only whether the employee has provided evidence that she can be reasonably accommodated sufficient to require submission to a jury, not indisputable proof.[33] Courts take this approach particularly where, as here, the duty to consider reassignment of duties emanates from an agency's already-existing policies.[34]

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33. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996) (plaintiff not demonstrate he was "otherwise qualified" for position held prior to being terminated by USPS, but district court erred in failing to consider whether plaintiff demonstrated other jobs available for which he was qualified and could be reassigned); *Brennan v. Stewart*, 834 F.2d 1248, 1262 (5th Cir. 1988); *Suttles v. U.S. Postal Service*, 927 F. Supp. 990 (S.D. Tex. 1996); *Henchey v. Town of North Greenbush*, 831 F. Supp. 960 (N.D. N.Y. 1993); *Galloway v. Superior Court of District of Columbia*, 816 F. Supp. 12 (D. D.C. 1993).

34. *Id.*

Certiorari review is necessary and proper, therefore, to resolve inter-Circuit conflict on the standards defining and the burdens of production and persuasion on the elements of "otherwise qualified" and "reasonable accommodation" under the Rehabilitation Act.

II. The Petition Should Be Granted Because The Decision Below Is In Conflict With Other Circuits Regarding The Quantum and Kind of Evidence Necessary To Satisfy The "Knowledge" Element Of A Retaliation Claim On Summary Judgment.

Finally, the Court's guidance on the standard against which "knowledge" is to be defined in a retaliation claim is crucial, as the court of appeals decision below disregarded overwhelming circumstantial evidence of the decision maker's "knowledge" of Petitioner's discrimination complaints and implicitly required direct evidence.

This Court recently reaffirmed in *Burlington Industries, Inc. v. Ellerth*[35] that the standard in employment discriminations cases is supposed to be that, when "[s]ummary judgment was granted for the employer, . . . [the Court] must take the facts alleged by the employee to be true." Based on that standard and the following record evidence set forth below, a retaliation claimant establishes, for the purpose of opposing a motion for summary judgment, that she has engaged in protected conduct, of which the decision maker, Ms. Hearn, had knowledge, and that there was a causal connection between that conduct and the adverse employment actions of threatened termination and forced disability retirement. The contrary holding below is in conflict with other federal jurisdictions on this point of law.[36]

35. *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

36. *See, e.g., Weeks v. State of Maine*, 866 F. Supp. 601 (D. Me. 1994) (jury could infer that supervisor knew about the complaint when personnel department knew of it.); *Revis v. Slocomb Indus.*, 814 F. Supp.

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First, Petitioner complained of discrimination *directly* to Ms. Hearn, the alleged decision maker, in Petitioner's June 9th letter to Ms. Hearn about two weeks before Ms. Hearn recommended that Ms. Williams be terminated. R1-43-Exh. 8. Ms. Hearn did not "ask[ ] that Ms. Williams be terminated" until *after* that June 9th letter, after sending her June 24, 1995 letter, satisfying the Eleventh Circuit's causal connection standard.[37] R1-45-48. And Petitioner's recognized, in the Eleventh Circuit, "protected expression"[38] directly to Ms. Hearn evidenced direct knowledge of those protected expressions. Initial Brief at 49-50.

Additionally, Petitioner and Ms. McNair testified that Petitioner's complaints of discrimination would have been in her employee file, which Ms. Hearn reviewed fully, and according to Ms. McNair, Ms. Hearn confirmed this to be so. R2-77-5, R2-80-5, Initial Brief at 8-9, Reply Brief at 4. Ms. McNair testified that while a management trainee, she learned that Surfside employees' files had:

> attendance records (vacation, sick leave, tardies used to determine disciplinary action), disciplinary records (such as letters of warning) *allegations of discrimination, such as letters and EEO complaints.* R2-77-4, R2-80-4 (emphasis added).

Other Circuits hold that a federal employer's failure to retain and later produce during litigation key evidence, in its exclusive possession and control, does not entitle that employer to a summary judgment inference its favor concerning that

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1209, 1219 (D. De. 1993) (jury could infer that a woman who knew about the complaints told her boyfriend, a manager at the company, even though she denied telling him about it.).

37. *Hairston v. Gainsville Sun Publ'g Co.*, 9 F. 3d 913 (11th Cir. 1993); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993).

38. *Hairston*, 9 F. 3d at 913; *Goldsmith*, 996 F.2d at 1163.

evidence.[39] Initial Brief at 23. This decision concluding otherwise is in conflict with those jurisdictions, by indulging this federal employer precisely that inference and disregarding Petitioner's evidence directly refuting that inference.

Finally, the USPS admitted Mr. Rojas, Carlos Rodon's supervisor, received the letter from Petitioner's attorney complaining of Mr. Rodon's discrimination, who "may have given the letter to the Union, who may have [, in turn,] provided the letter to [Mr. Rodon] for his review." RS1-3-4-42-50, R2-73-2. Mr. Rodon knew Petitioner invoked the Union grievance procedure over that disputed suspension letter and Mr. Rojas may have mentioned Mr. Kruger's letter. RS1-3-4-48. Mr. Rodon also recalled placing in her Surfside employee file supervisor notes and a note from Petitioner complaining about his rude manner toward her. RS1-3-4-57. Mr. Rodon trained Ms. Kelly Hearn as his replacement. RS1-3-4-9-10, Initial Brief at 7-9. A jury could reasonably conclude that Ms. Hearn refused to afford Petitioner's plausible accommodation and recommended her termination because of her complaints of discrimination — at least one made directly to Ms. Hearn — or because of Carlos Rodon's communications to Ms. Hearn about Petitioner's earlier complaints of discrimination when he trained her to be the new Surfside manager. This decision conflicts with *Ellerth's* "cats paw" causal connection recognition and the Fifth Circuit's *Long v. Eastfield College*[40] decision,

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39. *See Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (1722) (adverse presumption for destruction or loss of evidence first established); *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 216-20 (1st Cir. 1982) (adverse inference from document destruction sufficient to shift burden of tracing proceeds of money order sales); *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991) (bad faith not required for imposition of adverse inference), *cert. denied*, 503 U.S. 962 (1992); *Glover v. BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993) (simple notice of potential relevance of evidence to litigation sufficient for imposition of adverse inference).

40. *Long v. Eastfield College*, 88 F.3d 300, 307-08 (5th Cir. 1996).

wherein the Fifth Circuit found that a causal link could be established, though the individual who took the adverse action lacked knowledge of the protected expression, if that individual simply "rubber stamped" the recommendation of another who did know of protected expression.

CONCLUSION

FOR THESE REASONS, Petitioner, MARILYN WILLIAMS, prays that this Court grant a Writ of *Certiorari* to review the decision of the Eleventh Circuit Court of Appeal.

Respectfully submitted,

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- and -

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 8, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4065
Non-Argument Calendar

D. C. Docket No. 97-01713-CV-FAM

MARILYN A. WILLIAMS,

Plaintiff-Appellant,

versus

UNITED STATES POSTMASTER GENERAL,
William J. Henderson,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 8, 1999)

Before ANDERSON, Chief Judge, DUBINA and BLACK, Circuit Judges.

Appendix A

PER CURIAM:

Appellant Marilyn Williams appeals the district court's grant of summary judgment in favor of Appellee United States Postmaster General (the Postal Service) on Appellant's action alleging discrimination in violation of the Rehabilitation Act, as amended, 29 U.S.C. §§ 791, 794(a), and retaliation in violation of the Rehabilitation Act and Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000. Appellant contends the district court erred (1) in finding that Appellant was not "otherwise qualified"; (2) in finding that the individual who took the adverse employment action did not know that Appellant had engaged in protected activity; and (3) in finding that the Postal Service articulated legitimate, nondiscriminatory reasons for its actions. Upon our review of the record, we affirm.

Our review of the district court's grant of summary judgment is plenary. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). We will affirm the district court if, after construing the evidence in the light most favorable to the nonmoving party, we find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

To establish a claim for discrimination under the Rehabilitation Act, a plaintiff must show that he or she (1) is "handicapped" within the meaning of the Act; (2) is "otherwise qualified" for the position; (3) worked for a program or activity that received federal financial assistance; and (4) was adversely treated solely because of his or her handicap. *Jackson v. Veterans Administration*, 22 F.3d 277,

278 (11th Cir. 1994). A person is "otherwise qualified" if he or she is able to perform the essential functions of the job in question. *Id.* Appellant, in her disability retirement application, admitted that her handicap and medication "prevent[ed] [her] from performing [her] duties as a window clerk or any duties at the postal service." Appellant has thus failed to show she was able to meet her job requirements despite her handicap.

Absent direct evidence of discrimination, a plaintiff in a retaliation case must establish a prima facie case by showing that (1) she engaged in a statutorily protected activity; (2) the employer took an adverse employment action against her; and (3) there is a causal connection between the protected activity and the adverse action. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 318, 328 (11th Cir. 1998). Upon our review of the record, we agree with the district court that Appellant failed to demonstrate that the individual who denied her light duty or accommodation knew of Appellant's protected activity. We therefore conclude the district court did not err in finding Appellant failed to produce sufficient credible evidence for a reasonable trier of fact to find a causal connection between the protected activity and any adverse employment action.

Finally, upon our review of the record, we conclude the district court did not err in finding the Postal Service articulated legitimate nondiscriminatory reasons for taking adverse action against Appellant.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4065
Non-Argument Calendar

District Court Docket No. 97-01713-CV

MARILYN A. WILLIAMS,

Plaintiff-Appellant,

versus

UNITED STATES POSTMASTER GENERAL,
William J. Henderson,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, Chief Judge, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 8, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: NOV 23 1999

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED DECEMBER 10, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1713-CIV-MORENO

MARILYN A. WILLIAMS,

Plaintiff,

vs.

WILLIAM J. HENDERSON, Postmaster General of the United States Postal Service,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Marilyn Williams was formerly employed by the United States Postal Service as a window clerk at the Surfside station in Miami, Florida. Williams has sued the Postal Service for handicap discrimination under the Rehabilitation Act, 29 U.S.C. § 794(A), and for retaliation. Finding no genuine issues of material fact, the Court grants Defendant's motion for summary judgment.

Appendix B

I. BACKGROUND

Plaintiff, an African-American female, was formerly employed by the Postal Service as a Letter Sorting Machine carrier, and then as a window clerk. During her tenure at the Post Office, Plaintiff suffered from, *inter alia*, high blood pressure and severe depression, and three of her sons died during that time.

Plaintiff ceased working to care for one of her sick sons in January, 1995. Williams' son died on February 10, 1995. In March 1995, Kelly Hearn became acting manager of customer services in charge of Surfside station where Plaintiff worked, at which time Williams was still absent from work. Hearn was then informed, and the employee records indicated, that Williams' absence for the first three months of 1995 was on Family Medical Leave. Hearn called Williams to inquire whether she planned to return to work, and Williams became upset that Hearn had called her. Defendant maintains that this phone conversation (and possibly one other brief phone conversation) and a short meeting at the Surfside office on June 12, 1995 were the only verbal communications that ever occurred between Williams and Hearn.

Following a letter inquiry from Hearn to Williams in May 1995 regarding Williams continued absence, Williams' psychologist recommended that Williams be assigned at least temporarily to a low or moderately stressful assignment compared to her last assignment. In response, on June 5, 1995, Hearn sent a list of four potentially suitable job descriptions to Williams, but Williams and her doctor

concluded that Williams could not perform any of these jobs because Williams was taking medication that affected her vision and coordination such that she had difficulty driving and operating machinery, for example. Williams indicated that the four potential jobs would increase her stress level, and she requested that she be given temporary job accommodation based on her "limited duty status."

Williams reported to work on June 12, 1995. Hearn asked Williams to provide medical documentation that she could perform her job. Williams testified that Hearn told her there was nothing for her to do. Williams then left the station.

Hearn subsequently wrote Williams a letter on June 24, 1995 advising Williams that she was not in a "limited duty status," as she had not filed a claim of on-the-job injury. Hearn's letter directed Williams to do one of three things: 1) supply documentation from her doctor that she could return to work with no restriction; 2) file a claim for limited duty with the injury compensation office; or 3) request light duty status and specify jobs from the list previously sent that would be suitable.

Limited duty status refers to employees whose claims for workers' compensation benefits, arising from on-the-job injuries, have been accepted by the Department of Labor/ Office of Workers' Compensation Programs (OWCP). Providing work to limited duty employees does not cost the Postal Service because such employees, if not working, would receive workers' compensation benefits from OWCP, which in turn would charge back the Postal Service for the benefits. Employees who are on light duty status are unable

to perform fully the duties of their position due to an off-the-job injury. These employees do not receive benefits from OWCP, and the Postal Service thus does not bear the same costs if work is not made available to them compared to limited duty employees. Light duty work is not guaranteed to the requestor under the collective bargaining agreement between the Postal Service and the American Postal Workers Union, AFL-CIO.

Williams did not take any of the three actions advised by Hearn. Instead, she applied for disability retirement after consulting with her doctor, who advised her to do so because he believed she was unable to return to work or perform any other jobs. (Williams Dep. at 71). Williams doctor indicated, in a July 10, 1995 letter to the Disability Coordinator, that the likelihood of Williams returning to work and performing "tasks that require attention, concentration, persistence, and directional skills remain[s] grossly impaired." (Williams Dep. at 78-79; Williams Dep. Ex. 12). Williams agreed with this assessment, and indicated that she would not have been able to perform her job as window clerk: Plaintiff was unable to handle money, checks, or window stock and could not use machines or computers. As to the distribution clerk position, Plaintiff would have needed help from other employees to perform many tasks, and certain tasks she could not perform at all.

Hearn testified that Surfside was a small station with only a limited number of distribution and window clerks, and that there were not enough non-window duties at the station for a separate light duty assignment. (Hearn Decl. ¶¶ 4-5).

Plaintiff's certified statement of disability indicated that she "won't be able to perform any duties that will result or require me to concentrate or require any alertness or visual coordination skills. I can't cope with the stress that comes with the postal service." (Williams Dep. Ex. 11 at 8). Plaintiff further indicated that "[a]ll jobs at the post office require visual and coordination skills." (*Id.*). In an exhibit to her disability statement, Plaintiff also stated that she was suffering from depression based on work-related stress, that "[a]ll work at the post office will be too stress inducing for [her] to perform," and that she was taking Zoloft, which has many side effects that would "prevent [her] from performing [her] duties as a window clerk or any duties at the postal service." (*Id.* at 11). Plaintiff is now receiving disability retirement benefits.

Plaintiff's amended complaint asserts claims for handicap discrimination under the Rehabilitation Act, 29 U.S.C. § 794(A), and for retaliation. Plaintiff has voluntarily dismissed her race discrimination claim under Title VII, 42 U.S.C. § 2000e(b) *et seq.*

II. LEGAL STANDARD AND ANALYSIS

Summary judgment is authorized when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements

of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonably to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The *McDonnell Douglas* burden shifting analysis applies to Plaintiff's discrimination and retaliation claims. *See Pritchard v. Southern Company Servs.*, 92 F.3d 1130, 1132 (11th Cir.), *amended in part*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997); *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1327-28 (5th Cir. 1980). If Plaintiff can establish a *prima facie* case of discrimination or retaliation, the burden of production shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

After Defendant satisfies this burden, Plaintiff has the opportunity to demonstrate that the Defendant's proffered reason was not the true reason for the adverse employment action. *Id.* Plaintiff thus "has the opportunity to come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Id.*

Appendix B

A. Exhaustion

Defendant first argues that Plaintiff's action must be limited to the claims raised in her EEO complaint — that she was discriminated against based on race, sex, and mental disability, and that she was the victim of retaliation when she was denied light duty on June 12, 1995. The Court agrees with Defendant's argument. Plaintiff has failed to exhaust administrative remedies with regard to any alleged discriminatory action related to harassment, discharge, or constructive discharge. *Brown v. General Services Admin.*, 425 U.S. 820, 832-33 (1976); *Ray v. Freeman*, 626 F.2d 439, 442 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *see also Doe v. Garrett*, 903 F.2d 1455, 1458-61 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

The Court agrees with Defendant's argument that no express charges of disability-based or retaliation-based hostile environment were raised in Plaintiff's administrative complaint number 4-H-330-1551-95.

In addition, the parties agree that a plaintiff's judicial complaint "is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Mulhall v. Advance Sec., Inc.*, [illegible] F.3d 586, 589 n.8 (11th Cir.), *cert. denied*, 513 U.S. 919 (1994). Plaintiff's harassment and hostile environment claims focus largely on the alleged lack of sympathy she perceived from her supervisors as to her son's sickness and from the alleged failure to grant her FMLA leave. These claims are not sufficiently like or related to the charge against Hearn regarding the denial of light duty in June 1995, especially

the claims involving actions that occurred before Hearn arrived at Surfside. Plaintiff is attempting to bring into this case the complaints she made in two prior EEO administrative cases — numbers 4-H-330-1081-95 and 4-H-330-1098-95 — one of which was dismissed, and the other of which was resolved by agreement and withdrawn. Furthermore, Plaintiff failed to notify the EEO office that she disagreed with the issues as defined for the investigation of the administrative complaint that led to the instant case.

The Court further agrees with Defendant's argument that the "continuing violation" theory does not excuse the Plaintiff from exhausting administrative remedies before proceeding in federal district court. *See Scott v. St. Paul Postal Serv.*, 720 F.2d 524, 525 (8th Cir. 1983), *cert. denied*, 465 U.S. 1083 (1984). In addition, the exhaustion requirement would be undercut if Plaintiff were permitted to include her hostile environment claims in this action when the administrative complaints addressing those events were previously withdrawn or dismissed.

The Court thus will not expand Plaintiff's claims beyond those raised in administrative complaint 4-H-330-1551-95 regarding disability discrimination and retaliation arising from the denial of light duty work by Kelly Hearn on June 12, 1995.

B. Plaintiff's Rehabilitation Act claim

Plaintiff alleges that she was discriminated against on the basis of her handicap, which she describes as severe depression and high blood pressure.

Appendix B

1. The *Prima Facie* Case

To establish a *prima facie* case on this claim, Plaintiff must show 1) that she has a disability within the meaning of the Act and the regulations; 2) that she is "otherwise qualified" for the position in question; and 3) that she was adversely treated because of her disability. *Jackson v. Veterans Admin.*, 22 F.3d 277, 278 (11th Cir. 1994), *cert. dismissed*, 513 U.S. 1052 (1994).

a. Otherwise Qualified

Defendant argues that even if the Court assumes that Plaintiff meets the first element of the *prima facie* case — that she has a disability within the meaning of the Act — Plaintiff cannot met the second element because she was unable to perform the essential functions of her position as a window clerk. *See Jackson*, 22 F.3d at 278; *Rio v. Runyon*, 972 F. Supp. 1446, 1457 (S.D. Fla. 1997).

A job function may be considered essential if the position exists to perform that function. 29 C.F.R. § 1630.2(n)(2)(i). In addition, defendant must make reasonable accommodations to known physical or mental limitations of a qualified disabled employee unless the accommodation would impose an undue hardship on the operation of its program. 29 C.F.R. § 1614.203(c). Although reasonable accommodation may require job restructuring, and part-time or modified work schedules, 29 C.F.R. § 1614.203(c)(2), it does not require elimination or waiver of essential functions of a position, *see Rio*, 972 F. Supp. at 1457, nor does it require an employer to create or find a new position to accommodate a disabled

employee. *Rio*, 972 F. Supp. at 1458; *see also Chiari v. City of League City*, 920 F.2d 311, 310 (5th Cir. 1991).

Williams admitted she could not perform window duties, which comprised 90% of her job. Plaintiff wished to return to work merely to answer telephones and provide some assistance to other clerks, as a full-time light duty job, until she could resume her window clerk duties. (Williams Dep. at 46-49). Defendant argues, and the Court agrees, that this would not be a reasonable accommodation. While the Postal Service has permitted light duty temporarily as a discretionary act, this does not require the Postal Service to create a position specifically for Plaintiff as a disabled employee. *Rio*, 972 F. Supp. at 1458.

If there had been a funded, vacant position available, the essential duties of which Plaintiff could have performed, the Postal Service would have been required to reassign her absent any undue hardship to the agency or a violation of a collective bargaining agreement. However, Plaintiff has the burden of showing that a funded, vacant position existed, *see id.*, and Plaintiff has failed to do so, especially in light of Hearn's testimony regarding the limited number of distribution and window clerk positions at Surfside, and the fact that there were not enough non-window duties to constitute a separate light duty assignment.

While the Eleventh Circuit has found that "a certification of total disability on a disability benefits application is not inherently inconsistent with being 'qualified' under the ADA," *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1423 (11th Cir. 1998), the Court considers Plaintiff's disability retirement

application and her psychologist's supporting statements, viewed in the context of all of the relevant evidence in the record, as further evidence that Plaintiff could not have performed her job or any vacant job. In the disability retirement application, Plaintiff indicated that the Zoloft she was taking "prevent[ed] [her] from performing [her] duties as a window clerk or any duties at the postal service." (Williams Dep. Ex. 11 at 11). In addition, Dr. Oshodi stated, in a letter to the Disability Coordinator, that "from all indications, the likelihood of [Williams] returning to work and participating in tasks that require attention, concentration, persistence, and directional skills remain[s] grossly impaired." (Williams Dep. at 78-79). Williams has agreed that this accurately described her condition. (Williams Dep. at 79).

Based on the above analysis, the Court finds that Plaintiff has failed to establish a *prima facie* case on her Rehabilitation Act claim. However, the Court will also analyze the pretext issue, assuming for purposes of this motion that Plaintiff has established a *prima facie* case on this claim. *See infra* section II.D.

C. Plaintiff's Retaliation Claim

To establish a *prima facie* case of retaliation, Plaintiff must show that 1) she engaged in protected activity; 2) an adverse employment action occurred; and 3) there is a causal connection between the participation in the protected activity and the adverse employment action. *Berman v. Orkin Exterminating Co., Inc.*, No. 96-4852, 1998 WL 789173, at *3 (11th Cir. Nov. 13, 1998). As to the causal link

requirement, Plaintiff must merely prove that the protected activity and the adverse employment action are not completely unrelated. *Id.*

To establish the causal connection element, Plaintiff must also demonstrate that the individual who took the adverse employment action knew of the protected activity. *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 957-58 (N.D. Ga. 1995). Here, Plaintiff requested light duty or accommodation from Hearn. Prior to becoming acting manager at Surfside, Hearn had no contact with Williams, and Williams was on Family Medical Leave at that time. The evidence indicates that Hearn was unaware of any EEO complaints Williams may have made prior to Hearn's arrival at Surfside, until the time when Hearn received notice of the EEO complaint in which Williams asserted that Hearn had discriminated against her. (Hearn Dep. at 72-73). None of the evidence submitted by Plaintiff, including her own affidavit and the two affidavits from Sharon McNair, also a former employee at Surfside, establishes a genuine issue of material fact on this point.

The Court did inquire during oral argument as to the whereabouts of Plaintiff's employee file that was kept at the Surfside station. Defendant has indicated that the file cannot be found, and that there are no specific administrative procedures for maintaining or destroying such files. However, the Court still concludes that there is no evidence that the November 1, 1994 letter complaining of discrimination sent by Plaintiff's attorney to Raul Rojas, Postmaster, at 2200 N.W. 72 Ave. in Miami (*see* Hearn Dep. Ex. 2), was placed in Williams' file at Surfside or was sent to anyone at Surfside.

There is thus no causal connection between the protected activity and the adverse employment action, as Hearn did not know of Williams' protected activity. Plaintiff therefore cannot establish a *prima facie* case on her retaliation claim.

D. Defendant's Legitimate, Non-Discriminatory Reasons and Lack of Pretext

Even if Plaintiff is considered to have established a *prima facie* case of discrimination or retaliation, Defendant has articulated legitimate, non-discriminatory reasons for denying Plaintiff light duty work in June 1995, and Plaintiff cannot establish that these reasons were a pretext for disability discrimination or in retaliation for protected activity.

First, Williams was not entitled to limited duty work, which she requested in her June 9 letter, because at that time she had not even filed a claim with OWCP. Limited duty work is available to employees injured on the job with claims accepted by OWCP.

Second, if Plaintiff's request is construed as one for light duty, Plaintiff did not provide specific information regarding her particular restrictions, other than seeking a job with a low to moderate stress level.

Third, no light duty assignment was available at Surfside within Plaintiff's restrictions — she could neither work the window nor have contact with customers. In addition, Plaintiff refused the four other positions that had been suggested by Hearn.

Appendix B

Plaintiff argues that she has produced detailed and credible evidence to counter the Defendant's argument that she could not fill a limited or light duty position because none were available. The Court disagrees. Williams' assertions that she could sort mail for the mail carriers, or answer the phones and handle customer service requests, do not counter the fact that no funded, vacant position was available at Surfside. In addition, Sharon McNair's affidavit merely indicates that light and limited duty were sometimes granted by the Post Office, but McNair's assertions that the Post Office could have "create[d] a position, or "created work for [Williams] for eight hours" (McNair Aff. ¶¶ 6-7) support the argument that there was no vacant position available at the time at Surfside. "The Postal Service is not required to create a position specifically for a disabled employee." *Rio*, 972 F. Supp. at 1458.

Plaintiff further argues that she sought light duty because others, like her, had received light duty, thus indicating that this accommodation was not burdensome. Plaintiff also maintains that granting her light duty status would have helped the Surfside staff, which often worked overtime. However, this testimony from Williams and McNair neither establishes that a position was available within Plaintiff's restrictions, nor does the testimony adequately consider whether the individuals granted limited and light duty status were similarly situated to Plaintiff. For example, Lourdes Aleman was granted light duty status, apparently based on her pregnancy, but she was able to continue performing window clerk duties, which Plaintiff was unable to do. In addition, Hearn testified that while she was at Surfside, no employee working in light duty capacity was assigned to

answer the telephone as their exclusive or primary duty, and there simply were not enough non-window clerk duties at Surfside to give to a window clerk as a separate light duty assignment. (Hearn Decl. ¶¶ 4-5).

III. CONCLUSION

The Court concludes that Plaintiff has failed to establish a *prima facie* case of either disability discrimination or retaliation. Even if Plaintiff has established a *prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the adverse employment action, and Plaintiff has failed to demonstrate that those reasons were mere pretexts for discrimination. Therefore, summary judgment is granted in Defendant's favor.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of December, 1998.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED DECEMBER 11, 1998 AND FILED DECEMBER 14, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1713-CIV-MORENO

MARILYN A. WILLIAMS,

Plaintiff,

vs.

WILLIAM J. HENDERSON, Postmaster General of the United States Postal Service,

Defendant.

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendant's Motion for Summary Judgment, it is

ADJUDGED that judgment is entered in favor of Defendant, WILLIAM J. HENDERSON, Postmaster General of the United States Postal Service and against Plaintiff, MARILYN A. WILLIAMS. The case, namely the entire complaint, is dismissed with prejudice. Further, it is

Appendix C

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of December, 1998.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 4, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-04065-FF

MARILYN A. WILLIAMS

Plaintiff-Appellant,

versus

UNITED STATES POSTMASTER GENERAL,
William J. Henderson

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION (S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: ANDERSON, Chief Judge, DUBINA and BLACK, Circuit Judges.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE